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RESPONSE REQUESTED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-68

Supreme Court, U.S.
FILED
SEP 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

EDDIE S. YLST, Warden,

Petitioner,

v.

OWEN DUANE NUNNEMAKER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to 18 U.S.C. section 3006A(d)(6) and Rule 46 of this Court, respondent OWEN DUANE NUNNEMAKER, by his counsel, respectfully requests leave of this Court to file the Response to the Petition for Writ of Certiorari to the Supreme Court as requested by this Court, without prepayment of fees or costs and to proceed in forma pauperis.

Respondent, OWEN DUANE NUNNEMAKER, has been incarcerated within California State Prison since his conviction in 1976. Because of his indigency, counsel was appointed to represent him on his appeal in the California appellate courts and in the United

States Court of Appeal for the Ninth Circuit.

DATED: September 6, 1990

Respectfully submitted,

JULIANA DROUS
214 Duboce Avenue
San Francisco, CA 94103
(415) 863-3580

Attorney for Respondent
OWEN DUANE NUNNEMAKER

DECLARATION OF OWEN DUANE NUNNEMAKER

IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
COUNTY OF SOLANO)

I, OWEN DUANE NUNNEMAKER, swear under penalty of perjury that the following is true and correct:

I am the respondent in the above-entitled case and currently am incarcerated at the California Medical Facility in Vacaville, California.

Because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor.

I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of defending the petition are true.

1. Are you presently employed? NO (Disabled)

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

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b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received: Last emplcyment was 1964 - wages about $1.65 per hour.

2. Have you received within the past 12 months any income from a business, profession, or other form of self-employment, or

in the form of rent payments, interests, dividends, or other source?

NO

a. If the answer is yes, describe each source of income, and state the amount received during the past 12 months.

3. Do you own any cash or checking or savings accounts?

NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property. NO

5. List the persons who are dependent on you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury.

DATED: 9/11/90

OWEN DUANE NUNNEMAKER

On 9-14 90, 1990, before me, the undersigned, a Notary Public in and for the State of California, personally appeared OWEN DUANE NUNNEMAKER, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same. WITNESS my hand and official seal.

OFFICIAL SEAL
WILLIAM M. MOORS
NOTARY PUBLIC - CALIFORNIA
SOLANO COUNTY
My comm. expires AUG 3, 1993

NOTARY PUBLIC

No. 90-68

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN,

Petitioner,

v.

OWEN DUANE NUNNEMAKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JULIANA DROUS
Attorney at Law
214 Duboce Avenue
San Francisco, CA 94103
(415) 863-3580

Attorney for Respondent

QUESTION PRESENTED

Whether a state high court's denial of an original petition for writ of habeas corpus without comment or case citation constitutes a "plain statement" sufficient to establish the procedural default bar of federal habeas review under the Supreme Court's decision in Harris v. Reed, ___ U.S. ___, 109 S. Ct. 1038 (1989).

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OPINIONS BELOW

In addition to the opinions listed by petitioner, the decision of the California Supreme Court denying respondent's original petition for writ of habeas corpus should be included. This decision appears in the Petition for Writ of Certiorari in Appendix E.

No. 90-68

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OCTOBER TERM, 1990

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Owen Duane Nunnemaker, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit opinion in this case. The opinion is reported at 904 F.2d 473 (9th Cir. 1990).

STATEMENT OF THE FACTS

After respondent Owen Duane Nunnemaker was arrested and in custody, the district attorney sent in a psychiatrist to interview him. After asking Mr. Nunnemaker his age and occupation, the psychiatrist told him that the district attorney had asked him to see Mr. Nunnemaker. At no time was Mr. Nunnemaker advised of his rights pursuant to Miranda v. Arizona. The psychiatrist proceeded to interview Mr. Nunnemaker regarding his marriage, the circumstances of the incident which led to the separation, his difficulties during the separation, and the circumstances that Mr. Nunnemaker recalled about the shooting. After collecting this information, the psychiatrist filed a five-page report with the district attorney.

The information charging Mr. Nunnemaker with murder and assault with a deadly weapon was filed in the Sonoma County Superior Court on August 21, 1975. At the jury trial, the prosecution in its rebuttal presented evidence of respondent's statements made during the interview with the prosecution psychiatrist. The jury found respondent guilty of murder in the first degree, but acquitted him on a separate assault charge.

On direct appeal to the California Court of Appeal, respondent raised federal constitutional challenges to the testimony of the prosecution psychiatrist. In affirming the conviction, the state appellate court avoided these challenges, holding that the failure to interpose a specific objection during trial precluded consideration on review. The California Supreme

Court denied respondent's petition for hearing on September 27, 1978.

Respondent filed petitions for a writ of habeas corpus raising federal constitutional challenges in the California state courts. The Sonoma County Superior Court denied a petition on February 25, 1979. The California Court of Appeal denied a petition in 1985. And the California Supreme Court denied an original petition on December 3, 1986, citing In re Waltreus, 62 Cal.2d 218, 225 (1965) and In re Swain, 34 Cal.2d 300, 304 (1949).

Mr. Nunnemaker then filed a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. This petition was dismissed without prejudice because it was not clear whether all state remedies had been exhausted.

Mr. Nunnemaker filed a second original petition for habeas relief in the California Supreme Court. After this petition was denied without comment or case citation, Mr. Nunnemaker filed another petition for habeas relief in the federal district court. The court issued an Order to Show Cause on July 8, 1988, but then denied the petition on December 9, 1988, holding that state procedural default barred review of the Fifth and Sixth Amendment challenges to the prosecution's psychiatric testimony. In so ruling, the district court did not have the benefit of this Court's clarification of federal habeas law in Harris v. Reed, ___ U.S. ___, 109 S. Ct. 1038 (1989), which was decided after the

district court issued its decision.

On appeal, the Ninth Circuit Court of Appeal, with the guidance of Harris v. Reed, reversed the ruling of the district court and held that where, as here, a state high court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded. On May 25, 1990, the Ninth Circuit denied rehearing and amended its opinion.

The State of California filed a petition for a writ of certiorari in this Court on July 9, 1990.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below does not raise the Question Presented in the petition.

The sole Question Presented by the Attorney General in its petition is whether Harris v. Reed, ___ U.S. ___, 109 S. Ct. 1038 (1989), holds that a state high court's denial of habeas corpus relief, which is not a decision on the merits under state law, forgives a procedural default expressly claimed by an intermediate state appellate court on direct review. However, that is not the question raised in this case. In its opinion in this case, the Ninth Circuit merely followed the rational and plain language of Harris v. Reed, supra, which requires that where a state high court does not plainly state in a summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded.

This Court held in Harris v. Reed, supra, that the plain statement rule" of Michigan v. Long, 463 U.S. 1032, 1042 and n.7, 103 S. Ct. 3469, 3477 (1983) applies in a case on federal habeas review as well as in a case on direct review. Harris v. Reed, supra, has settled the conflict among the Court of Appeals over the standard for determining whether a state court's ambiguous invocation of a procedural default bars federal habeas review. The Court explained that the procedural default rule of Wainwright v. Sykes, 433 U.S. 72 97 S. Ct. 2497 (1977) has its historical and theoretical basis in the "adequate and independent state ground" doctrine. The Supreme Court will not

consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on the state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. The question whether a state court's reference to state law constitutes an adequate and independent state ground for its judgment may be rendered difficult by ambiguity in the state court's opinion. To avoid the difficulties associated with such ambiguity, this Court applied the "'plain statement' rule" of Michigan v. Long, supra, to federal habeas review and held that a procedural default does not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. Harris v. Reed, 109 S. Ct. at 1043.

The California Attorney General puts forth all of the claims -- that applying the Long "plain statement" requirement to habeas cases would harm the interests of finality, federalism, and comity -- that were argued and rejected by this Court in Harris v. Reed, 109 S. Ct. at 1044-45. This Court recognized "these significant state interests," but stated "that applying Long to habeas burdens those interests only minimally, if at all. The benefits, in contrast, are substantial." Harris v. Reed, 109 S. Ct. at 1044.

The California Attorney General's entire argument is based on the erroneous premise that a decision denying an original petition for habeas corpus relief is not a decision on the

merits. This argument is put forth by the Attorney General without citing authority. (See Petition at 14, 15, 20, 31, 32.)

In Harris v. Superior Court, 500 F.2d 1124 (9th Cir. 1974), cert. denied, 420 U.S. 973 (1975), the Ninth Circuit conducted a careful review of the California Supreme Court's practice of denying habeas corpus petitions without opinion. They concluded that there is "no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits of the petition, except where a citation in the order tells us so." Id. at 1128. This rule has been applied consistently in the Ninth Circuit. See, e.g., LaRue v. McCarthy, 833 F.2d 140 (9th Cir. 1987); Kim v. Villalobos, 799 F.2d 1317 (9th Cir. 1986); McQuown v. McCartney, 795 F.2d 807 (9th Cir. 1986).

As the Ninth Circuit noted in its decision in this case, a denial of an original petition for habeas relief is distinguished from a denial of a petition for review of a lower court's denial of habeas relief. A denial of a petition for review or petition for hearing from a lower court's denial is not a decision on the merits because by its nature it relates back to the original filing in the lower court. In contrast, a denial of an original petition for habeas relief is a judgment in and of itself. It is not an affirmance of a lower court's decision.

Any reliance by the Attorney General on People v. Medina, 6 Cal.3d 484 (1972) and People v. Pacini, 120 Cal.App.3d 877 (1981) is misplaced. These cases involve the doctrine of law of

the case. Law of the case concerns the effect of an appellate court's ruling on a legal issue on subsequent proceedings in the same suit. Richer v. Superior Court, 63 Cal.App.3d 748, 757 (1976). Moreover, the doctrine generally relates to proceedings before final judgment. In contrast, here we are faced with a petition for habeas corpus relief brought in federal court after final judgment on a state habeas proceeding.

Both in People v. Medina and in People v. Pacini, the California courts held that a state prisoner's case should not be forever barred from review because an appellate court issued a summary denial of a petition for extraordinary relief. The Pacini court reasoned that "Without an opinion it is not possible to determine what merits were resolved . . ." People v. Pacini, 120 Cal.App.3d at 886. Both cases resulted in decisions allowing a state defendant proper review of his contentions. In contrast, the Attorney General here argues that once any state court denies a claim on procedural grounds, a state defendant can be forever denied review of federal constitutional claims by the federal courts.

Without a clear and express statement as to the reason for a denial of an original petition for habeas corpus, it is unclear if the denial was based on procedural default, its lack of merit, or for any other reason. The Ninth Circuit's opinion did not view Harris v. Reed, supra, as forgiving a procedural default when a state high court denies habeas relief without comment or case citation. Rather, because without comment or case citation,

it is not possible to know the reason for the denial of relief, the Ninth Circuit, following Harris v. Reed, supra, stated that procedural default cannot be presumed.

Harris v. Reed makes plain that the state court must unambiguously rely upon the procedural default as a basis for its disposition of the case. The California Supreme Court may have denied the petition on its merits. Without a statement of reasons, the actual reason for denial can only be assumed, but not actually known. The Attorney General here does exactly tha which this Court disapproved in Harris v. Reed. The Attorney General presumes the reason for denial and asks this Court to accept its presumption.

The California Attorney General incorrectly asserts that the California Supreme Court twice denied Mr. Nunnemaker's habeas corpus petitions on the ground of procedural default. In fact, there is no indication whatsoever of unambiguous reliance upon a procedural default as a basis for the disposition in the state high court of either original petition for habeas relief.

The first petition was denied with citations to In re Swain, supra, 34 Cal.2d at 300, and In re Waltreus, supra, 62 Cal.2d 218. (See Appendix D, Petition for Writ of Certiorari.) Swain holds that in a habeas petition in the state court, a defendant is required to "allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts." Id. at 304. Waltreus holds that arguments rejected on appeal

will not be reviewed again in habeas. As the District Court for Northern California stated, "[t]hese citations are cryptic." Nunnemaker v. Ylst, 904 F.2d 473, 474 n.2 (9th Cir. 1990).

The California Supreme Court denied the second petition for writ of habeas corpus with no comment or citation at all. Because there is no clear and express statement as to the reason for denial of the second petition, the Attorney General can only presume the reason for denial. There is nothing in the rules of practice governing state habeas corpus procedure that could lead to the statement that Mr. Nunnemaker's petition was denied in fact for the reasons presumed by the Attorney General.

The Ninth Circuit's opinion in this case is not in conflict with other cases construing Harris v. Reed. The Fifth Circuit, applying Harris in Booker v. Lynaugh, 872 F.2d 100 (5th Cir. 1989), held that the district court was not precluded by procedural bar from reviewing a state prisoner's claims where the last state court to render judgment denied an application for habeas relief without opinion on a form order that stated, "Application denied without written order." Id. at 100. In Harman v. Burton, 894 F.2d 1268 (11th Cir. 1990), the Eleventh Circuit dealt with a state per curiam affirmance without a written opinion. The Eleventh Circuit found that a per curiam affirmance creates no ambiguity. They reasoned that an affirmance, by definition, clearly states that a lower court made a correct decision. Ellis v. Lynaugh, 873 F.2d 830 (5th Cir. 1989), also deals with an affirmance of a lower court's order.

Id. at 838. In Arce v. Smith, 889 F.2d 1271 (2d Cir. 1989), the last state court clearly and expressly stated that the reason for denial of relief was procedural default. Thus, the mandate of Harris was met.

In Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989), the Fifth Circuit, in concluding that the issue was barred from review by procedural default, expressly relied on the fact that on each occasion that the issue was presented to the state court, the procedural bar was applied. Id. at 1210. In the instant case, a different situation exists in that on each occasion that the issue was presented to the state high court, procedural bar was not unambiguously applied. As noted previously, the first original petition filed by Mr. Nunnemaker in the California Supreme Court was denied with citations to cases not necessarily dealing with procedural default.

The Ninth Circuit Court of Appeal's opinion on this case has not "furnished state prisoners with a blueprint for circumventing state procedural rules and forum shopping on federal issues." (Petition, pp. 1-12.) There is no reason why petitions for a writ of habeas corpus filed in state courts would predictably be denied without comment as asserted by the Attorney General. Presumably, the state courts read each petition for relief filed with them and make a decision as to whether each petition should or should not be granted. As stated by this Court in Harris v. Reed, supra, "a state court that wishes to rely on a procedural bar rule in a one-line pro forma order easily can write that

relief is denied for reasons of a procedural default." (Id. at 1044 n.12.)

"[T]he federal courts . . . have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." Harris v. Reed, 109 S. Ct. at 1045 (Stevens, J. concurring). Habeas review should not be denied arbitrarily.

This Court has given the states an eminently clear and direct way to assert procedural default if it wishes to do so. In rendering its opinion on this case, the Ninth Circuit simply followed the precedent of Harris v. Reed. The opinion in this case is consistent with the holdings of this Court. (See, e.g., Harris v. Reed, supra, ___ U.S. ___, 109 S. Ct. 1038; Caldwell v. Mississippi, 472 U.S. 320 (1985); Michigan v. Long, supra, 463 U.S. 1032. There is no conflict with the law. Thus, this case does not qualify for review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED: September 28, 1990.

JULIANA DROUS
Attorney for Respondent

CERTIFICATE OF SERVICE

Undersigned declares under penalty of perjury:

I am a citizen of the United States, over the age of eighteen, and not a party to the within action. My business address is 214 Duboce Avenue, San Francisco, California, 94103. On September 29, 1990, I served the foregoing RESPONDENT'S BRIEF IN OPPOSITION by placing in a sealed envelope with prepaid postage thereon, in the United States Mail, in San Francisco, California, and addressed as follows:

Ronald E. Niver
Supervising Deputy Attorney General
455 Golden Gate Avenue, Room 6200
San Francisco, CA 94102

Executed September 29, 1990, at San Francisco, California.

JULIANA DROUS